No. .....

IN THE

Supreme Court of the United States

October Term 1942

LESLIE FULLARD-LEO AND
ELLEN FULLARD-LEO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

The petition contains a statement of the case and of the grounds of jurisdiction, and references to the opinions of the courts below.

ERRORS TO BE URGED

The Circuit Court of Appeals erred in:

1. Holding that under the principles of international law, the taking of possession of the Island of Palmyra by Zenas Bent perfected the title of the King.

2. Holding that the contract between the Hawaiian government and E. P. Adams, dated May 31, 1858, formed part of the resolution regarding the Island Cornwallis.

3. Holding that the evidence did not warrant a finding that title had passed from the Hawaiian government by a lost grant.

4. Not holding that the judgment of the Land Court of Hawaii established fee simple title to the island in Henry E. Cooper, petitioners' grantor.

I.

THE COURT ERRED IN HOLDING THAT UNDER THE PRINCIPLES OF INTERNATIONAL LAW, THE TAKING OF POSSESSION OF THE ISLAND BY BENT PERFECTED THE TITLE OF THE KING.

Zenas Bent and Johnson Wilkinson occupied the Island of Palmyra for some years prior to 1862 when the island had no national sovereignty; they requested the Hawaiian government that the island "be considered a Hawaiian possession and be placed under the Hawaiian flag," and on February 26, 1862, their request was granted (R. 64).

On March 1, 1862, a commission was issued to Bent authorizing him to take possession of the island in the name of the King (R. 71). Accompanying the commission was a letter which stated the purpose of the annexation to be "increasing the trade and commerce of this Kingdom as well as offering protection to the interests of its subjects" (R. 69).

Bent executed his commission and reported to the minister of the interior on June 16, 1862 (R. 74), and on June 18 an official proclamation was made of the annexation of the island which would "henceforth be considered and respected as part of the domain of the King of the Hawaiian Islands" (R. 83).

That evidence was introduced by the plaintiff in the trial court in the endeavor to support the allegation con-

tained in paragraph I of the petition, as amended (R. 8), that Palmyra was annexed and became a part of the public or crown lands of the Kingdom of Hawaii on June 18, 1862.

The question was whether the island, upon its annexation, became public property of the Hawaiian government, or whether the extension of Hawaiian sovereignty over the island was in recognition of the possessory right of Bent & Wilkinson acquired by their prior occupancy of the island.

The majority of the court below held that "The commission makes it abundantly clear that Bent was merely acting as agent of the King. Under the principles of international law, the taking of possession by Bent perfected the title of the King. Nothing in the resolution or the letter referred to is contrary to that view."

In support of that view the court cited *Johnson v. McIntosh,* 8 Wheat. 543, and *Martin v. Waddell,* 16 Peters, 367, 409. Neither of those cases, however, dealt with a situation comparable with this case. In those cases the court dealt with the title to land which rested upon the right of discovery by persons acting under the authority of the British Crown.

Palmyra Island was discovered by an American in 1802, but no national sovereignty was extended to the island until by the government of Hawaii in 1862, and in the meantime it had been occupied by two Hawaiian subjects. The title to Palmyra as presented to the court does not involve title by discovery of unoccupied territory, but involves the title of occupied land by annexation. Different considerations must be applied.

A nation may acquire new territory either by discovery, cession, conquest, or by simple annexation.

Title by discovery implies that there is no one in possession, or at least no one who is recognized as having any title, such as the American Indians. *Patton* on Titles, Sec. 151.

Title by cession and by conquest imply that someone was in possession.

Title by annexation, through *ex parte* action, as in the case of Palmyra Island, implies that no other nation claimed sovereignty, but it is evident that there may have been individuals in possession, and there is no reason why they should not have been subjects of the annexing nation. In any event the annexing power could well recognize the rights of the occupants if it should see fit to do so. We contend that that was done with respect to Palmyra.

When sovereignty is extended by annexation it is analogous to extension through cession or conquest, in which cases the rights of the occupants are respected.

It is a well established principle of international law that the inhabitants of a country are protected in their property rights notwithstanding a transfer of sovereignty. 50 C. J. 1206. That principle has been applied in many cases by this Court with reference to land titles in territory formerly under the sovereignty of Spain, France and Mexico. It can appropriately be applied to a case like the present, and, we believe, was applied to Palmyra. The Hawaiian government was justified in doing so. This Court will not sit in judgment of what that government did. *Underhill v. Hernandez,* 168 U. S. 250, 252.

Bent & Wilkinson, when they took possession of the island, could not have acquired title from any government, for the reason that at that time no government had any title to convey. And if, as we contend, the sovereignty of Hawaii was extended there in recognition of and agreeably to their prior possessory right, there was no reason why they should have sought to obtain title from the Hawaiian government.

Bent & Wilkinson took possession when no country and no other individual claimed title. The island became theirs. They could not get paper title because no one had any title to convey to them. Nevertheless, their title by occupancy was good—it was the best that could be had. It remained only for the Hawaiian government to recognize it and to give the occupants the protection of law which they sought. The interests of the Hawaiian subjects which were to be protected by the annexation of the island (R. 69) were those of none other than Bent and Wilkinson.

Blackstone says that occupancy is the taking of things which before belonged to nobody, and that according to the law of nations that which belonged to no one is by natural reason granted to the occupant. 2 Bl. Com. 258. In a note to *Jones' Blackstone,* p. 1051, it is stated that "It is true that occupancy as a source of title in natural law assumes that the property has no individual owner, and that the occupant therefore, acquires a title which is valid from the moment of taking possession * * *"

Peaceable possession of land is *prima facie* evidence of ownership. In an action to quiet title to land the burden of proof is upon the plaintiff, and he cannot recover unless he proves a better title than the occupant has.

Upon the annexation of the island by the Hawaiian government Bent & Wilkinson received the protection of Hawaiian law, and their right of possession evolved into a title legally protected and enforceable. That title is now vested in these petitioners.

The Hawaiian government had the right to determine what its attitude and policy would be with reference to the annexation of Palmyra. In 1862 Hawaii was an independent nation (in form a monarchy) which had been recognized as such by the world powers since 1844, and it acted through the King as titular head of the government according to its own concept as to what was proper. It, like its successors, exercised "all the powers and prerogatives of complete sovereignty." *Hawaii v. Manikichi*, 190 U. S. 197, 216.

This case should not be decided according to what present-day courts may think the Hawaiian government could or should have done, but in view of what that government did or did not do.

> "In all ancient instruments and transactions, where doubtful words are used, where the purpose and intent are obscurely expressed, the acts and conduct of the parties, immediately following, are to be regarded as the best expositors."
>
> *Cambridge v. Lexington*, 17 Pick. 222, 230.

The entire record is consistent with an intent and understanding on the part of the Hawaiian government that the annexation of Palmyra extended Hawaiian sovereignty there without disturbing the possessory title of Bent & Wilkinson, and is irreconcilable with the notion that by

reason of the annexation the island necessarily became public land of the government.

In this connection we call the Court's attention particularly to the following circumstances:

(a) The proposal to annex the island did not emanate with the government. It was initiated by Bent & Wilkinson who must have had in mind some purpose of their own. Other evidence showed that they had been interested in the island for some years prior to that. What their enterprise was does not appear; whatever it was, they evidently had found the need of the protection of some sovereignty and of the law which would go with it. The applicants being Hawaiian subjects, naturally looked to the Hawaiian government. Obviously they were moving in their own interests, and not in the interests of the Hawaiian public. It was not their ambition that Palmyra be acquired by the government as public land. They wanted Hawaiian sovereignty extended there. Hence, their petition was that the island be placed under the Hawaiian flag and be considered a Hawaiian possession. Their petition was granted.

(b) The proclamation of annexation did not imply that the island had become public land. That constituted notice to the world, and especially to the foreign diplomatic representatives in Hawaii, that Hawaiian sovereignty had been extended to the island. It was of international concern and affected nations who were interested in acquiring islands in the Pacific; but was not intended to determine the status of Palmyra as public or private land which would be a mere matter of domestic concern not requiring a public proclamation.

(c) A careful search of the public archives of Hawaii (R. 210) and of the records in the office of the commissioner of public lands (R. 180) disclosed no evidence that the Hawaiian government ever claimed Palmyra as public land. The trial court so found the fact (R. 48).

In this connection the majority opinion below quoted from a report of the attorney general of the Territory made in 1905 (R. 297) which the dissenting opinion pointed out wholly distorted its meaning. The attorney general had been asked for an opinion as to the jurisdiction of the Territory of Hawaii "over the various small guano islands to the northwest of Kauai." Palmyra, being about a thousand miles southeasterly from Kauai, and not a guano island, was not within the scope of the inquiry. The attorney general had no occasion to investigate the private title to Palmyra although it was a matter of public record, and merely remarked that it seems to have been acquired during the reign of Kamehameha IV. The other islands lying to the northwest are guano islands, some of which had been commercially exploited by lessees who dealt in guano, whose rights had never been disputed, and this the attorney general regarded as evidence of the validity of the Hawaiian claim. There had been no lease of Palmyra so that that island was not within the attorney general's conclusion. It threw no light at all on the title to Palmyra.

(d) The Hawaiian government not only made no claim to Palmyra as public land, but in at least three years (1885-1887) assessed it for taxes as private property (R. 212-215).

In this connection the majority opinion below said that after 1887 "no taxes were levied against the island until 1911." That statement was incorrect and unfair. As pointed out in the dissenting opinion the evidence showed that many of the old tax records had been lost or are missing (R. 312) so that it cannot be ascertained whether the taxes were assessed and paid in other years. That is the not unnatural result of the assertion of the stale claim set up by the government. It is not the fault of these petitioners.

(e) The report of the commission appointed pursuant to the joint resolution of Congress was transmitted by the President to the Senate on December 6, 1898 (U. S. Senate Document 16, 55th Congress, 3rd Session). The trial court was asked to take judicial notice of it (R. 46).

The report contained what purported to be a complete inventory of the property, real and personal, belonging to the Republic of Hawaii, which was delivered over to the government of the United States pursuant to the terms of the annexation of Hawaii.

On page 4 of that report appears a list of the islands which comprised the Hawaiian group, in which Palmyra is included.

Beginning on page 47, and extending to page 64, is a statement showing the names, areas and locality of the public lands, title to which passed to the United States. Palmyra Island is not mentioned.

This would seem to be practically conclusive on the point that Palmyra was not a public land of the Republic of Hawaii.

The majority opinion below quoted a paragraph which appears on page 4 of the report, as follows:

> "The statistics available in regard to the public lands belonging to the Republic of Hawaii at the time of the cession to the United States are not of that absolute or definite character that they can be accepted as conclusive of areas and values."

In this case, however, neither the area nor the value of Palmyra is at all important. We are concerned only with the identity of the island, and there is no question as to that. The paragraph quoted is of no consequence here.

(f) On January 10, 1912, Walter F. Frear, Governor of Hawaii, wrote to the Secretary of the Interior saying, among other things concerning Palmyra,

> "The private title to this island has been from a date several years before 1862 to the present time in citizens of Hawaii and one Hawaiian corporation, successively, the records of the successive transfers being in the record and probate offices in this city. The present owner is Hon. H. E. Cooper, a circuit judge of the first circuit of this Territory and formerly Secretary of the Territory. Thus the title to the island both as to sovereignty and as to private ownership would seem to be American without question" (R. 195).

Enclosed with that letter was a copy of a letter addressed to Governor Frear by Henry E. Cooper, which contained the statement that "Capt. Zenas Bent and J. Wilkinson settled on the island sometime in the late 50's and made considerable improvements thereon" (R. 199).

Both of those letters were received in evidence without objection, the latter upon the insistence of counsel for the plaintiff (R. 189, 191).

The statements made in those letters therefore have the status of uncontested facts.

They show that Bent and Wilkinson were in occupation of the island at and prior to its becoming a part of the Hawaiian Kingdom in 1862.

(g) Immediately before the commencement of this action to quiet the title, the government of the United States, acting through officers of the navy, had been negotiating with these petitioners for a lease of two of the islets of Palmyra (R. 222, 228, 256, 281).

The fact that the plaintiff below, although it had the burden of proof, was unable to produce a particle of evidence to indicate that any of the several Hawaiian governments at any time asserted title or made any claim to Palmyra as public land, can be reconciled only with the proposition that the government recognized the private ownership of the island. That being so, title thereto could not have passed to the United States by the joint resolution of 1898 by which only public property was acquired from the Republic of Hawaii. Private titles were not affected.

It is the intention of the parties that is important. By the terms of the joint resolution there was ceded to the United States "sovereignty" over the Hawaiian Islands and their dependencies, and the "ownership" of all public, government or crown lands.

The Republic of Hawaii never claimed that Palmyra was public or crown land, nor was the island inventoried as public property when the United States assumed control.

Inasmuch as this question of title was never dreamed of until invoked by the exigencies of this case, it is abun

dantly evident that the island of Palmyra was not a factor in the annexation of the Hawaiian Islands in 1898.

II.

THE COURT ERRED IN HOLDING THAT THE CONTRACT BETWEEN THE HAWAIIAN GOVERNMENT AND E. P. ADAMS, DATED MAY 31, 1858 (R. 93), FORMED PART OF THE "RESOLUTION REGARDING THE ISLAND CORNWALLIS" REFERRED TO IN EXHIBIT C (R. 64).

The record shows in this connection that on May 24, 1858, one E. K. (should be E. P.) Adams wrote the Hawaiian minister of the interior stating that he had information of an island or islands in the North Pacific on which there were large deposits of guano and desired to take possession of the same in the name of the Hawaiian government, provided the government would grant him seven-eighths of the islands and give him the exclusive right to conduct all business connected therewith (R. 90).

It does not appear that the letter was replied to, but on May 31, 1858, an agreement was entered into between Adams and the minister of the interior whereby Adams was granted the exclusive right for five years to take guano or any other produce which may be found on any island or islands in the North Pacific ocean taken possession of, in the name of the King by Samuel Clesson Allen, Adams to pay to the government one-eighth of the profits of the enterprise (R. 93).

On the same date a commission was issued to Samuel Clesson Allen by the King, authorizing him to take possession of any island or islands in the North Pacific "which

are not in the possession of any other government or any other people" (R. 168).

Under date of July 12, 1858, Allen reported that he had visited and taken possession of two islands as directed by his commission, namely, Cornwallis Island and Kalama Island (R. 171).

At a meeting of the King's privy council held on July 27, 1858, a resolution was passed as follows:

> "Resolved that Cornwallis Island * * * and Kalama Island * * * having been taken possession of, with the usual formalities, on the 14th and 19th of June 1858, by Samuel C. Allen Esquire, in the name of Kamehameha IV, the said islands are to be considered as part of His Majesty's Domain."

It subsequently appeared that the Cornwallis Islands were discovered on January 8, 1858, by one Parker on the American Schooner Palestine, and possession was taken in the name of the United States and the American flag was raised.

The attorney general held (9 Op. A. G. 364) that the islands had become American property pursuant to the provisions of the Guano Islands Act of 1856 (U.S.C.A. Title 48, Secs. 1411, 1419). Allen's expedition was described as "a sharp scheme of Americans under cover of the Sandwich Islands sovereignty."

On October 16, 1858, the minister of the interior addressed a letter to E. P. Adams expressing regret at the unauthorized action of Mr. Allen and declared the agreement of May 31, 1858, to be "void" (R. 154).

The Hawaiian government abandoned its claim to Cornwallis (R. 101, 178, 217).

The majority of the court below took the view that the agreement made with Adams on May 31, 1858, and declared to be void on October 16 following, was part of the resolution regarding the Island Cornwallis within the meaning of the minutes of the cabinet council of February 26, 1862, when authorizing the annexation of Palmyra Island.

We contend that that view is untenable. The agreement with Adams assumed that the annexation of Cornwallis would be accomplished, but it formed no part of the annexation of the island which was expected to be made pursuant to the commission issued to Allen. What, if any, connection there was between Adams and Allen does not appear.

There is no evidence that Bent or Wilkinson had any knowledge that Adams had had an agreement with the government concerning the use of Cornwallis, and no presumption to that effect can be indulged. The minutes of the meeting of February 26, 1862, made no reference to any such agreement.

The expression used in the minutes with reference to the annexation of Palmyra Island, was that the minister of the interior was directed to "grant what the petitioners apply for, following the precedent of the resolution regarding the Island Cornwallis and without exceeding the same" (R. 64). The resolution regarding Cornwallis was a simple one. It merely declared that the islands "be considered part of His Majesty's domain," that is to say, that Hawaiian sovereignty be extended there. The phrase "without exceeding the same" could not have referred to the agreement with Adams which was no part of the reso-

lution. It is possible that another resolution regarding Cornwallis had been adopted but, if so, there is no evidence of it. There certainly is no room for any presumption or inference that an agreement was entered into by the government and Bent & Wilkinson concerning the use of the Island Palmyra. The whole tone of Bent's report (R. 74, 75) negatives the existence of such an agreement. The same may be said of the letter of the minister of the interior (R. 69).

The Hawaiian government was so chagrined with the outcome of the attempted annexation of Cornwallis that they doubtless would have liked to forget about it. What the government did remember was that their emissary, Allen, had deliberately removed the American flag, and had proceeded to annex the islands as though no one had previously been there. So, in issuing the commission to Bent, the government changed the phraseology to fit the occasion, using the words "not having been taken possession of" instead of "not in the possession of," as in Allen's commission. The King in council in 1862 wanted to make sure that Bent's commission would not result in another fiasco; hence it was decided that the resolution regarding Cornwallis should not be exceeded.

Taking Exhibit C (R. 63) and Exhibit N (R. 107) together, the reasonable interpretation would be that Palmyra would be annexed and declared to be part of His Majesty's domain if the island had not previously been taken possession of by any other government or people. The government did not want to be dragged into another controversy.

The evidence above referred to was introduced at the trial by the plaintiff in the endeavor to support the allegation contained in paragraph II of the petition (R. 3) to the effect that in 1862, Bent & Wilkinson had been granted the right to take guano and other produce from Palmyra for the period of five years.

It is our contention that the fact that an agreement to that effect had been made in 1858 with reference to the Island Cornwallis, is not evidence that such an agreement had been made with Bent & Wilkinson in 1862 with reference to the Island Palmyra, and that the allegation was not sustained by any proof.

III.

THE COURT ERRED IN NOT HOLDING THAT THE EVIDENCE WARRANTED A FINDING THAT THE TITLE TO THE ISLAND HAD PASSED FROM THE HAWAIIAN GOVERNMENT BY A LOST GRANT.

In the event that it should be held that the island, upon its annexation in 1862, became public land, it would be necessary to determine whether the government of Hawaii had subsequently parted with its title (R. 13).

The court below held that there was no proof of such alienation, and that the evidence did not show possession on the part of petitioners and their predecessors which would meet the requirements concerning lost grants.

It is true that owing to the lapse of years and the deaths of all of petitioners' predecessors in title, proof that actual possession had been maintained by them was not directly shown.

The registration of the fee simple title to the island by H. E. Cooper in 1912 implied that he was in possession, and there was some evidence of possession by petitioners, (R. 252), but counsel for the plaintiff objected to evidence of that description and agreed that what Mr. Fullard-Leo did with or about the island was irrelevant as to the question of title (R. 253, 254). That the petitioners were in possession was not controverted.

In considering the subject of the possession of land, regard must be had of its nature and situation. Possession of a small distant island is very different from possession of a parcel of land in a city, or even of agricultural or grazing land in a settled community. Continued physical occupation would not be expected and ought not to be required. Each case must depend on its own circumstances.

The taxation of the land as private property is a potent circumstance, since it cannot be assumed that the government would collect taxes on its own land, nor that an individual would pay taxes on land which he did not claim to own. *Jover y Costas v. Philippine Islands,* 221 U. S. 623, 633; *Roberts v. Northern Pacific Ry. Co.,* 158 U. S. 1; *State v. Carr,* 191 Fed. 257, 270; *Re Title of Kioloku,* 25 Haw. 357, 364, affirmed in *Territory v. Hutchinson Sugar Plantation Co.,* 272 Fed. 856.

If, upon the annexation of Palmyra in 1862, title to the island vested in the government as public land, it was subject to sale and conveyance, and the subsequent acquiescence by the governments of Hawaii in the private ownership, and the levy of taxes, creates and is entirely consistent with the possibility that a conveyance was made to Bent & Wilkinson though none such can now be found.

Such circumstances justify all reasonable presumptions in support of the claim of title. *Carino v. Philippine Islands,* 212 U. S. 449, 460.

It was shown that in the years 1885, 1886 and 1887, the government assessed the island and collected taxes from its then owner. The succeeding owners having died and the old tax records being incomplete through loss (R. 312), further proof of the payment of taxes could not be made, but it is a reasonable presumption that the taxes were assessed against and paid by the several successive owners.

We believe that there is no difference in principle between this case and the *Carino* and *Kioloku* cases since in each there was a direct chain of private title but no evidence of an original grant from the government. Here, as in the *Carino* case "as far back as testimony and memory goes, the land has been held by individuals under a claim of private ownership."

Assuming, for the sake of argument only, that in 1862 Palmyra was public land, the events of the many years which have elapsed can be logically accounted for only by the presumption that the government had parted with its title.

IV.

THE COURT ERRED IN NOT HOLDING THAT THE JUDGMENT OF THE LAND COURT OF HAWAII ESTABLISHED FEE SIMPLE TITLE TO THE ISLAND IN HENRY E. COOPER, PETITIONERS' GRANTOR.

As pointed out in the dissenting opinion below, the bearing on this case of the judgment of the Land Court of

Hawaii whereby the fee simple title to Palmyra was adjudged to be in H. E. Cooper was not given sufficient attention.

The plaintiff had alleged that the Land Court proceeded without jurisdiction (R. 4) and prayed that its decree be declared invalid and held for naught (R. 6).

A copy of the proceedings in the Land Court was admitted in evidence at the trial of this case (R. 136, 138, 145, 150) but was not printed in the record. The exhibits were sent to the Court of Appeals (R. 56, 345).

The Territory had been made a party, and it filed a disclaimer of interest (R. 146). The United States of course was not made a party, but it could have intervened. Land Title, *Kalena,* 34 Haw. 93.

The Land Court exercises a very broad jurisdiction, and may adjudicate equitable as well as legal rights (Rev. Laws Hawaii 1935, Sec. 5037 [4]).

Section 91 of the Hawaiian Organic Act (U.S.C.A. Title 48, Sec. 511) provides that the public property ceded to the United States by the Republic of Hawaii "shall be and remain in the possession, use and control of the government of the Territory and shall be maintained, managed and cared for by it at its own expense until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the Governor of Hawaii," and may be restored to its previous status by direction of the President, "and the title to any property so transferred to the Territory may thereafter be transferred" to any political subdivision by the governor.

By paragraph (1) of section 72, the Territory may sell public land and give good title to the purchaser (U.S.C.A., Title 48, Sec. 673). The Territory may lease public land and use the rent for its own purposes.

The Territory may, and, as shown by the *Kioloku* case, *supra,* does take advantage of the statute to register title to public land in its own name.

In short, the Territory, unless or until the land be taken for federal purposes, and subject to certain restrictions not material here, may deal with the land as the owner thereof.

That, evidently, would authorize the Territory to file a disclaimer of interest in a proceeding in the Land Court when it has been made a party, and in fact claims no interest, as was done in the proceeding to register the title to Palmyra in 1912. It would be an exercise of the power and authority given to the Territory by the Organic Act. We think that the very least that could be said is that the Territory is the authorized agent of the United States as to all matters concerning the management of the public lands in Hawaii, including authority to take proper steps in Land Court proceedings, as was done in Land Title, *Kalena, supra,* where the land in dispute had previously been taken over by the federal government in conformity with the above quoted provisions of section 91 of the Organic Act.

If, after a land title has been registered and has changed hands in reliance on the certificate of the Land Court, as was done with respect to Palmyra, the federal government can repudiate the disclaimer of the Territory, the Torrens system of Hawaii is not what it is generally supposed to be.

It would certainly seem that the petitioners are, at least, entitled to protection as *bona fide* purchasers.

A subordinate phase of the *Palmyra* case went to the Supreme Court of Hawaii. *In re Title to Palmyra Island,* 21 Haw. 431. Thereafter further proceedings were had in the Land Court and a final decision was rendered, with the result already stated.

The majority opinion below referred to that fact but, as pointed out in the dissenting opinion, it attached no importance to it. We believe that was error.

In *John Ii Estate v. Brown,* 235 U. S. 342, a proceeding commenced in the federal court, this Court had before it a somewhat similar situation, and reversed the judgment of the Court of Appeals because it had not accepted the law on a local question as it had been laid down by the Supreme Court of Hawaii in another proceeding. This Court expressed surprise (p. 349) that the court below had not followed the decision of "the court on the spot" (p. 346).

The application to this case of the rule applied in that case would require a holding to the effect that the title to the island had been settled in the proceeding in the Land Court.

CONCLUSION

The first question hereinabove discussed is one as to which we believe there is no judicial precedent, and has been decided by the court below upon a misapplication of the law concerning title by discovery. The second and third questions, we contend, were erroneously decided for the reasons mentioned. The fourth question has inferen-

tially been decided adversely to these petitioners without adequate consideration by the court below, and in a manner not consonant with views heretofore expressed by this Court.

We submit that this Court, in the exercise of its supervisory jurisdiction, should grant certiorari in this case, and, upon hearing of the cause, reverse the judgment of the Court of Appeals and reinstate that of the District Court.

DATED: Honolulu, Hawaii, March 18, 1943.

Respectfully submitted,

A. G. M. ROBERTSON,
Counsel for Petitioners.

ROBERTSON & CASTLE,
Of Counsel.